Trujillo v. Apple Computer, Inc. et al Doc. 96 Att. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JOSE TRUJILLO, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, Defendants.	Civil Case No. 1:07-cv-04946 Hon. Matthew F. Kennelly

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SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

Dated: May 5, 2008

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Trujillo's procedural unconscionability arguments—which focus on a restocking fee that Apple charges in certain circumstances for iPhone returns—do not warrant declaring his agreement to arbitrate on an individual basis unenforceable. First, Trujillo's objection to the restocking fee is ***entirely hypothetical***: He never claims that he objected to the terms of service and would have returned his iPhone were it not for the restocking fee. Second, contrary to Trujillo's assertions, he could have determined from ATTM's web site that ATTM required customers to arbitrate their disputes as a condition of obtaining service—before he opened his iPhone box.

In any event, the debate over the restocking fee is academic. Under Illinois law, the existence of a restocking fee does not make Trujillo's arbitration agreement procedurally unconscionable. Even if it did, the degree of procedural unconscionability would be minimal at best. Under Illinois's sliding-scale approach to unconscionability, that minimal degree of procedural unconscionability is insufficient to render ATTM's terms of service unenforceable. Because ATTM's provision—which is the most pro-consumer arbitration provision in the nation—is not substantively unconscionable at all, much less extremely so, Illinois law (and the FAA) require enforcement of Trujillo's arbitration agreement.

1. The restocking fee argument is a red herring: Trujillo never claims that the prospect of having to pay a restocking fee actually dissuaded ***him*** from rejecting ATTM's arbitration provision and returning his iPhone. The "hypothetical" possibility that some other customer might have purchased an iPhone, opened the box, read the terms of service in the course of activating his service, disagreed with those terms enough to want to return the iPhone, but been deterred by the (incorrect) belief that a restocking fee would be deducted from his refund is "irrelevant" to whether ***Trujillo*** (who has made no such factual assertion[1]) can void his agreement on unconscionability grounds. *West v. Henderson*, 278 Cal. Rptr. 570, 576 (Ct. App. 1991); *accord Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 265, 275 (Ill. 2006) (procedural unconscionability of arbitration provision turns on "all of the circumstances surrounding ***the transaction***," and thus "the enforceability of a class action waiver * * * must be determined on a case-by-case basis") (emphasis added). Indeed, if the rule were otherwise, any customer could at any time seek to have the terms of service declared void on unconscionability grounds even if he or she had never bothered to read the terms of service during the 30-day buyer's remorse period.

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[1] As the proponent of unconscionability, Trujillo bears the burden of proof. *See Zobrist v. Verizon Wireless,* 822 N.E.2d 531, 541 (Ill. App. Ct. 2004).

2. Trujillo could have reviewed ATTM's arbitration provision on ATTM's web site before opening the box containing his iPhone. Although ATTM has discovered that the Apple store in Oak Brook, Illinois did not keep ATTM's terms of service booklets in stock (Supp. Dec. of Neal S. Berinhout ¶ 3), ATTM's terms of service are readily available on its web site. That medium is particularly accessible to prospective iPhone purchasers because the iPhone cannot be activated without Internet access. To find the terms, prospective purchasers could use the "search" tool at the top of each ATTM web page (or a third-party search engine). Dec. of Harry Bennett ¶¶ 5–6 & Exs. 1–2.[2] In addition, potential customers who were specifically interested in finding out how disputes would be resolved could easily have located information about ATTM's arbitration provision at http://www.att.com/disputeresolution. *Id.* ¶ 7 & Ex. 3.

3. Even if ATTM's arbitration provision had not been available to Trujillo until he activated his service (when he was presented with and accepted ATTM's service terms), his agreement to arbitrate is not procedurally unconscionable under Illinois law. *See* Supp. Reply (Dkt. No. 89) 3–5 (citing *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Bess v. DirecTV, Inc.*, __ N.E.2d __, 2008 WL 740344 (Ill. App. Ct. Mar. 18, 2008)). Although this Court has stated that it does not find *Bess* or *Hill* "dispositive of the present case" (Order 7–8), we respectfully submit that the Court has overlooked several reasons why they are.

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[2] A user who searched for "terms of service" or a similar formulation on ATTM's web site in July 2007 would have located a version of the terms of service that had last been revised in February 2006. Bennett Dec. ¶ 6. The February 2006 service terms contained an earlier version of ATTM's arbitration provision than the one at issue here (but a later version than the one at issue in *Kinkel*). That iPhone purchasers actually received a more consumer-friendly version of the arbitration provision than a prospective customer would have seen on the web site is irrelevant for purposes of procedural unconscionability, however, because the earlier version would have placed the prospective customer on notice that he or she would be required to resolve disputes through individual arbitration. *Id.* Ex. 2 at 10–12.

To begin with, Trujillo was in a better position than the plaintiff in *Bess* in several respects. Trujillo was presented with and assented to ATTM's terms of service ***before*** he activated service, whereas Bess received DirecTV's service terms only ***after*** activating service. Bess did have an opportunity to reject the terms of DirecTV's agreement and cancel service without having to pay a "deactivation fee," but had to do so "upon receipt" of her agreement (2008 WL 740344, at *7); Trujillo, by contrast, had 30 days to cancel ATTM service without paying an early-termination fee. Berinhout Dec. (Dkt. No. 40) Ex. 3 at 2. Similar to Trujillo, Bess had ***already*** "acquired the equipment necessary to receive DirecTV service" (2008 WL 740344, at *1)—presumably from "an independent retailer" (*id.* at *16 (Stewart, P.J., dissenting))—***before*** she received DirecTV's service agreement. Bess, however, received "***no assurance***" that she could "return the equipment" required to receive DirecTV's programming "and receive a ***full*** refund." *Id.* at *7 (emphases added). In contrast, Trujillo's Apple store receipt made clear that he was ***guaranteed*** a 90 percent refund if he returned an opened iPhone within 14 days (Pl.'s Supp. Opp. (Dkt. No. 86) Ex. B)—and in fact, under Apple's policy, he would have received a ***full*** refund if he returned the iPhone within 30 days. In short, *Bess*'s holding that DirecTV's arbitration provision is not procedurally unconscionable applies here with even greater force.

This Court also questioned whether the Illinois Supreme Court repudiated *Hill* in *Razor v.*

Hyundai Motor America, 854 N.E.2d 607 (Ill. 2006). *See* Order 9–10. We submit that it did not, for two reasons. ***First***, *Razor* did not mention *Hill* and therefore should not be presumed to have jettisoned it, particularly because companies have entered into millions of contracts in reliance on *Hill*.[3] ***Second***, *Razor* is distinguishable because it did not involve the "accept-or-return" method of contract formation at issue in *Hill* and in this case. Nothing in the decision or the briefs suggests that, once Razor had "signed the contract and driven the car off the lot" (854 N.E.2d at 623), she could have returned the car if she disagreed with the contract terms at issue.

Finally, *Razor* itself confirms that Illinois law did not require ATTM and Apple to provide all contractual terms to Trujillo at the time of purchase, explaining: "One of the ways in which plaintiff could potentially have received the warranty is if it had been contained in the sale contract which she signed, ***but this is not the only possibility***." 854 N.E.2d at 624 (emphasis added). Here, of course, the arbitration provision was part of the wireless service agreement that Trujillo agreed to when he accepted service. Moreover, when Trujillo purchased his iPhone, he was notified that he would have to enter an ATTM service agreement (Berinhout Dec. Ex. 2), and, as an Internet user, he could easily have discovered on ATTM's web site that he would be obligated to arbitrate his disputes.

4. Even if the Court concludes that there is some measure of procedural unconscionability here, the possibility that a customer might have to pay a restocking fee—which is hardly unusual (Supp. Reply 3–4)—entails a "degree of procedural unconscionability" that is "insufficient to render the arbitration provision unenforceable." *Bess*, 2008 WL 740344, at *8. Like "nonnegotiable" "contract[s] of adhesion," contracts with restocking fees "are a fact of modern

[3] Indeed, just two years before *Razor*, the Illinois Supreme Court cited *Hill* in noting without any evident disapproval that the Seventh Circuit had "rejected several challenges to the validity of the Gateway arbitration clause." *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 971 (Ill. 2004).

life," and consumers "routinely sign such agreements[.]" *Kinkel*, 857 N.E.2d at 266. "It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable" (*id.*)—especially given that Trujillo was under no compulsion to purchase a $500 iPhone.

Indeed, Trujillo's arbitration agreement falls lower on the spectrum of procedural unconscionability than the provisions at issue in *Kinkel* and *Bess*, neither of which was deemed to be so procedurally unconscionable as to be unenforceable without inquiry into substantive unconscionability. The *Kinkel* court held that Cingular's failure to disclose the "cost of arbitration"—while creating a "degree of procedural unconscionability"—was not "sufficient to render the class action waiver unenforceable," but merely was "a factor to be considered in combination with our findings on * * * substantive unconscionability." 857 N.E.2d at 266. Trujillo's contract, of course, explicitly specifies that arbitration would cost Trujillo nothing. Arb. Mem. (Dkt. No. 37) 3. And even though Bess had no assurance that she would be refunded any (much less 90%) of the cost of her equipment, that was not enough to result in invalidation of her arbitration provision without consideration of substantive unconscionability. 2008 WL 740344, at *8–*12.[4]

As we have already discussed (Arb. Mem. 8–10; Reply (Dkt. No. 77) 6–13), ATTM's arbitration provision is not substantively unconscionable under Illinois law. Accordingly, it is enforceable even if the Court concludes that the possibility that a customer might have to pay a restocking fee entails a modicum of procedural unconscionability.

[4] Indeed, if the Court were to conclude that the possibility that a customer might have to pay a restocking fee were alone sufficient to declare the arbitration provision in Trujillo's terms of service unenforceable, the ramifications would be dramatic. Form contracts like ATTM's terms of service "stand or fall together." *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004). If ATTM's terms fall, then each and every term contained in millions of consumer contracts would become voidable at will—creating drastic uncertainty for everyday commerce.

Dated: May 5, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah E. Reynolds, an attorney, I hereby certify that on May 5, 2008, I electronically filed the foregoing **SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT AT&T MOBILITY LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS ACTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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